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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

PACIFIC SYSTEMS,

Plaintiff and Appellant,

v.

GIANT SKATEBOARD DISTRIBUTION
et al.,

Defendants and Respondents.

B211380

(Los Angeles County
Super. Ct. No. BC362382)

APPEAL from an order of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Reversed.

Tangalakis & Tangalakis and Phillip L. Tangalakis for Plaintiff and Appellant.

Friedman Stroffe & Gerard, James D. Stroffe, Eoin L. Kreditor, and Joshua D. Meier for Defendants and Respondents.

Plaintiff and appellant Pacific Systems (plaintiff) appeals from a postjudgment order denying its motion for attorney fees under Civil Code section 1717. We reverse the trial court's order.

BACKGROUND

On or about June 1, 2004, plaintiff and W.G. Wells (Wells) entered into a written lease agreement (the lease) with defendants and respondents Giant Skateboard Distribution and Paul Schmitt for certain premises located in Huntington Beach, California (the leased premises). Wells executed the lease as the lessor in both his individual capacity and as the general manager of plaintiff. The lease contained a provision allowing the lessor to recover reasonable attorney fees from the lessee in the event of a breach by the lessee. On May 1, 2005, Giant Skateboard Distribution and Paul Schmitt assigned the lease to defendants and respondents Jason Speer, Anthony Froude, and Frank Jalufka.¹ Wells consented to the lease assignment as plaintiff's general manager.

Pursuant to a legal services agreement dated August 1, 2005, plaintiff retained the law firm of William G. Wells & Associates to represent plaintiff "in its litigation against Lessees through final judgment, including any appeals, pertaining to Lessees" at the leased premises. The agreement stated that plaintiff would pay Wells's law firm an hourly rate between \$300 and \$400, "but in no event less than one-third of any recovery, as billed subject to the time, complexity, results and subject to matters involved, including overtime demands and in-court appearances." The agreement did not identify defendants or any other persons or entities as the lessees against whom plaintiff was litigating.

On November 22, 2006, plaintiff filed this action against defendants for breach of contract for unpaid rent. On September 18, 2007, plaintiff filed a first amended complaint seeking damages in addition to unpaid rent. On September 10, 2007, plaintiff retained the law firm of Christa & Jackson to assist in trial preparation.

¹ Giant Skateboard Distribution, Paul Schmitt, Jason Speer, Anthony Froude, and Frank Jalufka are referred to collectively as defendants.

On December 13, 2007, defendants served a Code of Civil Procedure section 998 statutory offer to compromise that included an offer by defendants “to pay Plaintiff’s reasonable attorney’s fees and costs incurred in this matter to date, in an amount to be determined by the Court upon a noticed motion, which amount will be added to and included in the judgment.” Plaintiff accepted that offer on January 9, 2008. Judgment in plaintiff’s favor was entered pursuant to the section 998 offer on March 13, 2008.

On May 12, 2008, plaintiff filed a motion for attorney fees seeking \$115,955 in fees to Wells plus a \$32,400 fee to Wells for successfully re-letting the leased premises. In support of the motion, plaintiff submitted, among other things, a 48-page billing statement from Wells documenting the work he performed in connection with the lawsuit against defendants. Defendants opposed the motion for attorney fees on the grounds that plaintiff was not entitled to recover as attorney fees a \$32,400 leasing commission paid to Wells; that plaintiff did not incur any attorney fees because plaintiff “was represented by its Owner and General Manager,” Wells; and evidence of Wells’s fees was speculative and without foundation.

On July 31, 2008, the trial court awarded plaintiff fees for Christa & Jackson in the amount of \$12,422.50 and \$147.08 in costs. The court continued the hearing regarding plaintiff’s request for Wells’s fees.

On August 25, 2008, the trial court denied plaintiff’s motion for Wells’s attorney fees, reasoning as follows: “In *Trope v. Katz* (1995) 11 Cal.4th 274, the California Supreme Court held that an attorney who chooses to litigate *in pro per* to enforce a contract containing an attorney fee provision could not recover reasonable attorney’s fees under [Civil Code section] 1717. In analyzing the statutory language of section 1717, the California Supreme Court found that the usual and ordinary meaning of the words ‘attorney fees’ is the consideration that a litigant actually pays or becomes liable to pay [in] exchange for legal representation, and that in the case of an attorney litigating in pro per, the attorney pays no such compensation. [¶] Although *Trope* involved a law firm, the analysis employed in *Trope* may be applicable on the issue of whether Plaintiff, a corporation, can recover attorney’s fees for legal representation in this litigation that was

conducted by its owner and general manager, Wells. Aside from Wells[’s] declaration stating that the amount of \$115,955 was incurred by Pacific Systems, there is no evidence to substantiate this claim. The itemized billing produced by Wells (Exh. D) is significantly incomplete, and no evidence is submitted by moving party to show that Wells was acting outside his role as general manager and that separate fees were incurred by Pacific Systems [T]here is no evidence that Pacific Systems actually incurred \$115,995 in attorney’s fees to Wells.”

Plaintiff then filed separate motions for a new trial, for reconsideration of the order denying its motion for attorney fees, and to vacate and set aside the order denying the motion for attorney fees. In support of those motions, plaintiff submitted a declaration by its president, Robert Thompson, which states: “At no time since its incorporation in 1986 to this date has W.G. Wells owned any shares or owned any interest in PACIFIC SYSTEMS other than from time to time being engaged as an attorney for PACIFIC SYSTEMS.” Plaintiff also submitted a declaration by Wells in which he states: “[A]t no time have I owned any shares of stock in PACIFIC SYSTEMS.” The trial court denied plaintiff’s motions, and this appeal followed.

DISCUSSION

I. Applicable Law and Standard of Review

Civil Code section 1717, subdivision (a) provides in pertinent part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs. [¶] . . . [¶] Reasonable attorney’s fees shall be fixed by the court, and shall be an element of the costs of suit.”

“Generally, a trial court’s determination of whether a party is entitled to an award of attorney fees, and the calculation of such a fee award, are both reviewed for abuse of discretion. [Citations.] . . . [A]lthough the normal standard of review regarding an attorney fees award is abuse of discretion, “discretion may not be exercised whimsically,

and reversal is required where there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied.” [Citation.]’ [Citations.] In determining whether the court used the correct legal standard in awarding attorney fees, de novo review is required. [Citations.]” (See *Jankey v. Lee* (2010) 181 Cal.App.4th 1173, 1179.) To the extent that the award relies on factual findings, whether express or implied, we examine the record for substantial evidence to support the findings. (*Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860.)

II. Substantial Evidence Does Not Support the Trial Court’s Findings

The trial court denied plaintiff’s motion for attorney fees on the grounds that Wells was an owner and general manager of plaintiff; that there was no evidence, apart from Wells’s declaration, that plaintiff incurred \$115,955 in attorney fees; that the itemized billing statements submitted by Wells were significantly incomplete; and that there was no evidence to show that Wells was acting outside his role as plaintiff’s general manager. The record does not support these findings.

A. Wells as an Owner

Although there is evidence in the record that Wells was an officer and general manager of plaintiff, there is no evidence that he was an owner. Rather, there is evidence to the contrary. Plaintiff submitted a declaration by its president, Robert Thompson, stating that Wells has never owned any shares or any interest in plaintiff. Wells also submitted a declaration stating that he has never owned any shares of plaintiff’s stock.

There is some question as to whether Wells had an ownership interest in the leased premises. Wells was identified as a lessor in the lease and he executed the lease both in his individual capacity and as the general manager of plaintiff. Paragraph 17 of the lease defines “Lessor” as the “owner or owners at the time in question of the fee title to the Premises.” Although the first amended complaint alleges that “[p]rior to the commencement of this action, W.G. Wells assigned all of his right, title and interest in and to said Lease and the obligations herein sued upon to Plaintiff,” the record does not include any evidence of such an assignment. In this appeal, plaintiff sought to introduce

additional evidence, in the form of declarations by plaintiff's president and by Wells, stating that Wells has never had any ownership interest in the leased premises. It is not the role of an appellate court, however, to resolve conflicts in the evidence or to make factual findings not made by the trial court.² (*In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 75-76; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1090.) The issue is a matter to be resolved by the trial court.

B. Attorney Fees Incurred

Civil Code section 1717 provides for recovery of attorney fees "incurred" to enforce a contract. In *Trope v. Katz*, *supra*, 11 Cal.4th 274 (*Trope*), our Supreme Court stated that "[t]o 'incur' a fee . . . is to 'become liable' for it [citation], i.e., to become obligated to *pay* it." (*Id.* at p. 280.) In *Trope*, the Supreme Court considered whether an attorney who chooses to litigate in pro. per. rather than retain an attorney to represent him in an action to enforce a contract containing an attorney fee clause can recover attorney fees under Civil Code section 1717. The court concluded that fees could not be recovered in such a case because "an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities." (*Trope*, at p. 280.) The court reasoned that it would frustrate the intent of the statute to allow attorney-litigants to recover contractual attorney fees, while denying such fees to nonattorneys representing themselves. "If an attorney who is the prevailing party in an action to enforce a contract with an attorney fee provision can recover compensation for the time he expends litigating his case in propria persona, but a nonattorney pro se litigant cannot do so regardless of the personal and economic value of such time simply because he has chosen to pursue a different occupation, *every* such contract would be oppressive and one-sided." (*Id.* at pp. 285-286.)

The court in *Trope* expressly declined to address whether in-house counsel fees could be recovered under Civil Code section 1717. In *PLCM Group, Inc. v. Drexler*

² Plaintiff's motion for a factual determination on appeal and production of additional evidence on appeal was denied by this court.

(2000) 22 Cal.4th 1084, the Supreme Court concluded that in-house counsel fees were recoverable under Civil Code section 1717: “[I]n-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer.” (*PLCM Group*, at p. 1093.) The court went on to explain that “the term ‘attorney fees’ implies the existence of an attorney-client relationship, i.e., a party receiving professional services from a lawyer” and that “[a] corporation represented by in-house counsel is in an agency relationship, i.e., it has hired an attorney to provide professional legal services on its behalf.” (*Id.* at pp. 1092, 1093.) Applying this rationale to the instant case, Wells’s status as plaintiff’s general manager should not preclude plaintiff from recovering fees for Wells’s legal services, so long as Wells was not representing his own personal interests.

The trial court found that there was no evidence, apart from Wells’s declaration, that plaintiff “incurred” attorney fees. There was other evidence, however, of an attorney-client relationship between Wells and plaintiff. The record includes a legal services agreement pursuant to which plaintiff retained Wells’s law firm to represent it in litigation against “Lessees” at the leased premises and that obligated plaintiff to pay Wells’s fees in connection with such litigation. The record also includes a 48-page billing statement that the trial court found, without explanation, to be “significantly incomplete.” That billing statement may include tasks that came within the scope of Wells’s duties as general manager, but it also includes tasks such as legal research and preparing pleadings that were outside the scope of Wells’s business responsibilities. The trial court made no finding as to the credibility of this or any other evidence.

Because substantial evidence does not support the trial court’s factual findings, its denial of plaintiff’s motion for attorney fees was an abuse of discretion.

DISPOSITION

The order denying the motion for attorney fees is reversed. The matter is remanded to the trial court to determine the amount of fees to be awarded to plaintiff. Plaintiff is awarded its costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST